IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO.363 OF 2001.

Rakesh R. Sharma]
Aged about years, permanently]
residing at Khotwadi, Firoj Shah] Appellant.
Mehta Road, Nandu Singh Chawl,] (Org.Accd.)
Santacruz (West), Mumbai 400 054]
at Yerawada Central Prison, Pune]

versus.

1. The Assistant Commissioner]
of Customs]
Prosecution Cell, Sahar]
Airport, Mumbai]
2. The State of Maharashtra] Respondents.

Ms.Deepa Bajaj for the appellant.
Mr.P.S.Thakur, PP, for Union of India.
Mr.A.M.Shringarpure, APP, for the State.

CORAM : D.G.DESHPANDE,J.

DATED : 31st August 2004.

ORAL JUDGMENT.

1. This appeal is filed by the accused against his conviction under Section 29 r/w 8(c) and 22 of the N.D.P.S. Act by the Special Judge (NDPS), Brihanmumbai, vide his judgment dated 13.3.2001 by which the accused has been sentenced to suffer R.I. for 10 years and to pay a fine of Rs.One lac and in default to undergo S.I. for 3 months. The accused is in custody since 19.6.1998 till this date.

2. The case of the prosecution, in short, is that, The Assistant Commissioner of Customs, Sahar Airport, Mumbai received a letter dated 18.6.1998 from on Tauseef Khan, Air Port Manager, South African Airway, Mumbai to the effect that two bags of South African Airways Flight SA-277 dated 18.6.1988 were found to be tagged twice by the counter staff of the airline with the Tag No.SA-157605 and SA-157606 and as such the said tags were overloaded and the concerned passenger was required to identify the tags. Further information in the said letter is that all the

four bags were tagged in the name of SOBEY/CP MRS. The said passenger identified two bags out of four as her baggage and, therefore, the other two tags which were tagged under the same tag numbers were taken to the Aircraft Door and all the passengers were asked to identify the bags. However, none of the passengers from the said flight could identify the other two bags. Two bags were taken charge of and under the letter and directions of Assistant commissioner addressed to the Air Intelligence Unit of Customs a search was carried out in presence of two panchas and the two bags were found containing 88.334 grams methaqualone tablets. The matter was thoroughly investigated and it was found during investigation that one Shinde loader had brought those bags and he sought help of this accused in getting duplicate tags.

3. The procedure in this regard was brought on record by P.W.3- Taqseefkhan Mohd. Anis Khan who was working with South African Airways as Air Port Manager since 1995 and he was in the station at the Airport. His evidence, which is relevant for the purpose of role of this accused and that of Shinde, is in Paras 4 and 5 which are as

under:-

Para No.4 :- On 17.6.98 I reported duty at the Air-Port at 11.00 p.m. At about 11.45 p.m. I came to the checked-in-counter Shri Sunil Thilat had allotted duty to our staff. Milind Sawant was allotted duty at the ramp area. The ramp area is around make-up area and the Air-craft. The Hariprasad was working as an errand staff-acting as a peon. Richa Yadav was supervising counter area to sort out any grievances of the passengers. The Air-India staff manning the counter were Rakesh Sharma and 2 others. Rakesh Sharma is present in the Court. Accd. sitting in the dock is the said Rakesh Sharma. (Witness points out the accd. sitting in the dock). There was one loader by name

Shinde. The said Shinde was assisting in taging the bag on and of. There were some passengers at the counter when I went there. Most of the staff members of South African Airways have walkie talkie sets. I was having one, Milind Sawant was having one, Richa Yadav having one. With the help of this sets we can communicate with each other. If somebody is near me we can hear the voice of calling party. If I speak loudly others present near me can also hear. On that day the flight was S.A.277 and the time of departure was 2.30 a.m. on 18.6.98. While I was at the counter on 18.6.98 Milind Sawant contacted me on walkie talkie and informed that there were 2 bags that has duplicate tag numbers as detected by Air-India security in the make-up area. The name of the passenger given as Sobey C.P.

Mrs. Milind Sawant told me that there were 4 bags in the make-up area and 2 bags had duplicate tag number on the bags i.e. to say 2 bags had same number. when the call came at that time the accd. was present. I told Milind Sawant to get all the 4 bag of loaded. At that time I did not know who from the air-India staff had issued duplicate number of baggage tag. The accd. stated to me that he has checked in the said passenger Sobey in whose name the 4 pieces of baggage were shown. The accd. stated to me that he has checked in all 4 bags from his counter. When I asked for an explanation from the accd. the accd. stated that the passenger Sobey had actually 4 bags but he initially checked in 2 baggages. Since there were 2 more bags alongwith this 2 bags he thought that his bags have not been checked in and he took out

the same tag numbers again off tagged on the said 2 pieces of baggage. I asked him as to how the discrepancy took place and he stated that there was an error on his part. We had a discussion and the accd. suggested that the problem could be solves by adding 2 more baggages in the computer and issue fresh tag. I allowed him to do that. and I moved away from the counter. I also believed him as he was authorised Air-India staff and allowed him to do what he said.

Para 5 :- The accd. took 4 tags from the computer 2 of the old number and 2 next consecutive numbers. I do not remember those consecutive numbers. At the relevant time I had seen the number from the tags as well as computer number. The accd. sent the tags through another loader by name Shinde whom I have

> mentioned above. The loader went and attached the new tags on the 4 bags. Shri Shinde brought the earlier tags having duplicate number on the checked-in-counter. Shri Shinde showed the tags to me to convince me that there was an error because of lines on the tags. Shinde threw the tags in the dustbin. I did not retain the said tags."

4. Mr.Thakur, appearing for the Union of India, urged that so far as the role of this accused is concerned, the aforesaid evidence of P.W.3 is vital and important and, therefore, the case of the prosecution is that this accused helped loader Shinde in getting two duplicate tags as requested by Mr.Shinde.

5. The crucial question in this matter is, whether this present accused was knowing that loader Shinde had loaded in the baggage mandrax tablets of such huge quantity or any quantity of mandrax tablets or; whether this accused was

knowing, and there is any evidence in that regard, that loader Shinde was doing some illegal activities with reference to the NDPS Act and that; whether this accused knowingly aided, abetted loader Shinde in the present specific instance.

6. At this juncture the matter was adjourned to enable Mr.Thakur, PP, to point out as to what is the evidence with the prosecution in this regard against this accused and, from the evidence of 22 to 23 witnesses he fairly pointed out that the only relevant evidence against the present accused is in the form of his statement recorded under Section 108 of the Customs Act. That statement is at Exhibit 8. It is recorded on 19.6.98 and, on page 9 of the said statement this accused has given following answer :-

> "Answer :- That on 17.6.98 Flight of South African Airways 277 2 bags were pushed by Mr.Shinde loader for which I had given him the tags. Though he did not tell me the exact contain of the said bags, due to his record brought

> to my notice time and again by my airline staff, I thought this 2 bags may be containing narcotics drugs. Even though I had suspicion that this may be containing narcotic drugs, I had provided Mr.Shinde loader with the tags for the same As I was in need of money."

This is the only evidence against this accused so far as it relates to his knowledge of the contents of two bags from which around 88.334 grams of mandrax tablets were recovered. Since the accused is charged for the conspiracy, knowledge on his part of the contents of the bags is absolutely necessary. If without any knowledge about the contents of the bags which loader Shinde pushed, the accused had given to tags, then at the most it can be said that he was not diligent in his duty. However, the question is of serious charge of conspiracy with reference to the provisions of NDPS Act against the accused and, therefore, conscious knowledge of the conspiracy is an essential ingredient. The said loader Shinde is admittedly absconding till today

since before his confessional statement could be recorded. There is no other witness who can throw any light about the dialogues, conversions or interaction between the loader Shinde and this accused and, no other evidence to show that this accused helped loader Shinde after fully knowing about the contents of the bags.

7. Therefore, what is lacking in the case is basic requirements of consciousness of the activities of the loader Shinde and knowledge of illegal activities of the loader Shinde in sending or exporting mandrax tablets in such a huge quantity out of the country. The charge against the accused at Exhibit 4 and it reads as, the accused/appellant along with V.K.Shinde and others conspired to commit or abetted to the commission of offence under the NDPS Act viz. under Section 29 r/w 8(c), 22 and 23 and on 18.6.98 in pursuance of the said conspiracy acquired, stored, warehoused, transported, 88.334 grams of mandrex tablets which were recovered from two suitcases bearing baggage tags Nos. 019502 and 019505 which were attempted to be

pushed by the accused/appellant, and thirdly, on 18.6.98 in pursuance of the said conspiracy and in furtherance of the common object attempted to export the aforesaid quantity.

8. It is pertinent to note that though the accused was charged under Section 29 r/w 8(c), 22 and 23, then 22 r/w 8(c) and 29 and, then 28 r/w 22, 23, 8(C) and 29 of the NDPS Act, he came to be convicted by the Special Court only under Section 29 r/w 8(c) and 22 of the NDPS Act and the present appeal is against the said conviction.

9. Section 29 of the NDPS Act as already observed is about punishment of criminal conspiracy. The basic requirements of that section is whoever abets, or is a party to a criminal conspiracy and, therefore knowledge of conspiracy and the acts done towards abetment after getting knowledge are the basic requirements for attracting the aforesaid section 29.

10. Section 8(c) of the NDPS Act speaks of prohibition of certain operation and it reads

that No person shall --- (c) produce, manufacture, possess, sell, purchase, transport, ----- export from India or tranship any narcotic drug or psychotropic substance.

11. Admittedly, the prohibition will apply to a person who knows or is conscious of articles being narcotic drugs or psychotropic substance with reference to the charge levelled against him. Here in the case what the accused has stated in his answer in the statement reproduced above, during recording of his statement under Section 108 of the Customs Act, is that he was suspecting or he was thinking. That will obviously not amount to the knowledge of the conspiracy or being conscious of the conspiracy. My attention was drawn by the counsel for the accused to the injury report of the accused when he was examined as per the orders of the Court by Medical Officer, Bombay Central Prison Hospital. The report is about examination of the accused on 21.6.98 wherein five injuries were noted on the person of the accused, and the doctor has opined that the injuries were 36-72 hours duration at that time of examination. The counsel appearing for the accused, therefore, stated that the

aforesaid statement, upon which reliance was placed by Mr.Thakur, PP, was obtained after assaulting the accused.

12. In fact, the statement that was recorded under Section 108 of the Customs Act and the portion involving the accused, reproduced by me above, does not come to the rescue of the prosecution in proving the case against the accused about he being a party to the conspiracy. Therefore, it is not necessary to go into this aspect that whether such a statement was obtained by coercion or by beating. No other point was urged before me and, in view of the submissions made by Mr.Thakur, PP and the evidence pointed out by him, this is a case where appeal is required to be allowed and the conviction is liable to be set aside by giving the accused clear cut acquittal. Hence the order.

:ORDER:

1. The appeal is allowed.

2. The accused/appellant is acquitted of the offences under Section 29 r/w 8(c) and 22 of the

NDPS Act.

3. The accused/appellant is in custody. He should be set at liberty forthwith if not required in another case.

4. If the accused/appellant has paid the fine, the same should be returned to him.

5. Rest of the order about disposal of the property remains the same.

[D.G.DESHPANDE]

31.08.2004. JUDGE.

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Mr.A.M.Shringarpure, APP, for the State.

CORAM : D.G.DESHPANDE,J.

DATED : 31st August 2004.

OPERATIVE ORDER

. For the reasons separately recorded, the following order is passed :-

1. The appeal is allowed.

2. The accused/appellant is acquitted of the offences under Section 29 r/w 8(c) and 22 of the NDPS Act.

3. The accused/appellant is in custody. He should be set at liberty forthwith if not required in another case.

4. If the accused/appellant has paid the fine, the same should be returned to him.

5. Rest of the order about disposal of the property remains the same.

[D.G.DESHPANDE]

31.08.2004. JUDGE.